

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAFAEL DAVILA, and
DEBORAH CUMMINGS,

Defendants.

NOS. CR-03-021-RHW
CR-03-022-RHW

**ORDER RE: MAY 11, 2005
PRETRIAL HEARING**

A pretrial hearing was held in this matter on May 11, 2005, in Spokane, Washington. Defendant Davila was present and represented by Mark Vovos; Defendant Cummings was present and represented by Christian Phelps and Jennifer Fassbender. The Government was represented by Earl Hicks and Mary Claire Rourke. Before the Court are a number of motions. This order memorializes the Court's oral rulings.

I. Defendant Davila's Motion Pursuant to Rules of Professional Conduct 3.7

Defendant Davila asserts that Earl Hicks, who is one of the prosecuting Assistant United States Attorneys in this case, is a factual witness regarding the circumstances that lead to Agent McEuen writing a report in 2002. Apparently, at some point in preparing this case for prosecution, Mr. Hicks instructed Agent McEuen to write a supplemental report regarding the statements made by Defendant Davila in 2000.¹

In determining the credibility of the statements made by Defendant Davila, it is important for the jury to hear what was said at the meeting between Agent McEuen and

¹In the April 25, 2002, 302 Report, Agent McEuen stated that he wrote the 302 Report "in preparation for testimony."

1 Mr. Hicks. This information can be obtained through the testimony of Agent McEuen,
2 and it will not be necessary for Mr. Hicks to take the stand, unless the agents are unable
3 to recall specific facts that can be testified to only by Mr. Hicks. In order to make this
4 determination prior to trial, Agent McEuen is directed to file an affidavit regarding the
5 meeting in which the writing of the 2002 302 report was discussed. Mr. Hicks and Ms.
6 Rourke are to review his affidavit and each file an affidavit indicating that Agent
7 McEuen's recollection of the meeting is complete, or, if it is not, supplement Agent
8 McEuen's recollection of the meeting with additional details that they can recall.

9 **II. Defendant Cummings's Motion Joining Co-Defendant's Motion to Pursuant**
10 **to Rules of Professional Conduct 3.7, with Supplemental Information**

11 Defendant Cummings asserts that Mr. Hicks is a factual witness as to her
12 demeanor, her apparent mental/emotional state, and to her alleged admissions and
13 denials during an interview of Ms. Cummings in Mr. Hicks's office in August, 2000. If
14 the Government intends to use Defendant Cummings's August 2000 statement, the
15 context of the statements, including the questioner's perception of the mental capacity
16 of Defendant Cummings, is relevant to the credibility of the statement.

17 Mr. Hicks is directed to submit an affidavit setting forth the reasons for asking
18 the question concerning Defendant Cummings's mental capacity or use of drugs. If Mr.
19 Hicks had concerns regarding Defendant Cummings's mental capacity, then his
20 perceptions would be relevant to the credibility, and he would be a factual witness. If
21 Mr. Hicks's questions were merely investigative or intended to solicit background
22 information, then Agent McEuen, who was present at the hearing, can testify as to the
23 circumstances of Defendant Cummings giving her statement.

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25 **III. The Government's Motion in Limine to Exclude Results of Defendant**
26 **Cummings Polygraph Examination**

27 The Government asks to exclude testimony at trial that Defendant Cummings
28 failed a polygraph examination. Defendants have not filed any objection to the motion;

1 nor has the Court conducted a *Daubert* hearing on the matter. Thus, the Court will
2 grant the Government's motion.

3 **IV. The Government's Motion for Reconsideration re Order on Motion in**
4 **Limine**

5 On April 22, 2005, the Court entered an order denying the Government's motion
6 in limine. The Government sought to have evidence and testimony regarding
7 Defendant Davila's polygraph examination excluded. After conducting a *Daubert*
8 hearing, the Court ruled that the circumstances of taking Defendant Davila's 2000
9 statements, including the fact that he was told he passed the polygraph examination,
10 was relevant to his state of mind at the time he made the statements. The Government
11 asserts that Defendant Davila must testify as to his state of mind at the time he made the
12 statements before testimony regarding the polygraph examination can be admitted at
13 trial. The Court disagrees. The circumstances surrounding the making of Defendant
14 Davila's statement is subject to legitimate inquiry regardless of whether Defendant
15 Davila takes the stand.

16 The Court also determined that testimony regarding the polygraph examination
17 would be admitted for substantive purposes, except that testimony regarding Question
18 5R would be excluded. Because Question 5R will be admitted for state of mind
19 purposes, but not for substantive purposes, the Court will need to give the jury a
20 limiting instruction regarding the use of Question 5R. The Government is directed to
21 file a proposed jury instruction for the Court to instruct the jury regarding the limited
22 use of Question 5R.

23 **V. Defendant's Motion to Reconsider Court's Ruling RE: SCIFs**

24 Defendant asks the Court to reconsider its ruling regarding the nomenclature that
25 the parties are required to use at trial regarding the SCIFs that are located at Fort Lewis,
26 Washington. Defendant asserts that by being limited to referring the SCIFs by number,
27 he cannot distinguish for the jury that each SCIF may have different missions and
28 different documents. In its previous order, the Court did not limit the Defendant's

1 ability to ask questions that would distinguish the two facilities regarding their general
2 functions. Defendant is not raising any new issues that have not already been addressed
3 by the Court.

4 **VI. Defendant Davila's Renewed Motion to Allow the Defense to Contact**
5 **Government Witnesses**

6 Defendant filed his Renewed Motion to Allow the Defense to Contact
7 Government Witnesses on the morning of the pretrial hearing. Because the Court was
8 in trial, it was unable to review his pending motion. The Court directed Mr. Vovos,
9 Defendant's counsel, to write a letter to the Court outlining his need to contact
10 particular witnesses. Upon reviewing Defendant's motion and the letter, the Court finds
11 that it is incumbent upon the Government to assist Defendant in locating these
12 individuals. The Government should provided whatever information it can obtain from
13 the agency that hired the individual, or from the agency from which the person retired.
14 Specifically, the Government shall provide to Defendant any forwarding information
15 and last-known addresses, for the following individuals known to the agency for which
16 they worked, or known to the Department of Justice: Richard McManus; Sergeant
17 Deleon, Glenn Packard, Michael Maroney, William Johnson, and Stephen White III.

18 Defendant also requested information concerning John Dalton. At the hearing,
19 the Government represented that Defendant was permitted to use the sworn statement of
20 John Dalton in lieu of testimony. Thus, it is unnecessary for the Government to provide
21 the forwarding information and last-known address of Mr. Dalton, and Defendant's
22 request to depose Mr. Dalton is moot.

23 Accordingly, **IT IS HEREBY ORDERED:**

24 1. Defendant Davila's Motion Pursuant to Rules of Professional Conduct 3.7
25 (CR-03-21-RHW [Ct. Rec. 257]) is **DENIED**, with leave to renew.

26 2. Defendant Cummings's Motion Joining Co-Defendant's Motion [] Pursuant to
27 Rules of Professional Conduct 3.7, with Supplemental Information (CR-03-22-RHW
28 [Ct. Rec. 206]) is **GRANTED**.

1 3. The Government's Motion in Limine to Exclude Results of Defendant
2 Cummings Polygraph Examination (CR-03-21-RHW [Ct. Rec. 260]); (CR-03-22-RHW
3 [Ct. Rec. 198]) is **GRANTED**.

4 4. The Government's Motion for Order Directing United States Attorneys Office
5 to Assist in Serving Defense Subpoenas on Military Personnel (CR-03-21-RHW [Ct.
6 Rec. 264]); (CR-03-22-RHW [Ct. Rec. 202]) is **DENIED, as moot**.

7 5. The Government's Motion for Clarification and Further Limitation Regarding
8 Court's Order of Admissibility of Polygraph Evidence (CR-03-21-RHW [Ct. Rec. 261];
9 (CR-03-22-RHW [Ct. Rec. 199]) is **DENIED**. On or before May 20, 2005, the
10 Government is directed to file a proposed jury instruction regarding the limited use of
11 Question 5R of Defendant's polygraph examination.

12 6. On or before May 13, 2005, Agent McEuen is directed to file an affidavit
13 regarding the circumstances that led to the writing of the April 25, 2002, 302 report. On
14 or before May 16, 2005, Mr. Hicks and Ms. Rourke are directed to file an affidavit
15 indicating whether Agent McEuen's recollection is complete, or, if it is not,
16 supplementing Agent McEuen's recollection of the meeting.

17 7. On or before May 13, 2005, Mr. Hicks is directed to file an affidavit setting
18 forth the reasons for asking the question concerning Defendant Cummings's mental
19 capacity or use of drugs.

20 8. Defendant Davila's Renewed Motion to Allow the Defense to Contact
21 Government Witnesses (CR-03-21-RHW [Ct. Rec. 268]) is **GRANTED**.

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s/ ROBERT H. WHALEY
United States District Judge

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